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Supreme Court, U. S.
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In The Supreme Court Of The United States

October Term, 1980

No. _____

CONTINENTAL OIL COMPANY *Petitioner*

V.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and SECRETARY OF LABOR
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

SEPARATE APPENDIX

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No. 78-3445

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONTINENTAL OIL COMPANY, *Petitioner,* v. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, *Respondents.*	ON PETITION to Review an Order of The Occupational Safety and Health Review Commission.

Decided and Filed September 2, 1980.

Before CELEBREZZE and KEITH, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. This case is before the court on petition to review the order of the Occupational Safety and Health Review Commission affirming the Secretary of Labor's citation against petitioner for violation of the general duty clause of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1). We affirm.

Petitioner, Continental Oil Company, operates a pipeline terminal facility in Chattanooga, Tennessee. Petroleum products are stored in large tanks. The products are piped into the facility from a common carrier pipeline which has a centralized dispatch facility in Atlanta, Georgia, and a local dispatch facility near the tank farm. Distribution of the products is then made in trucks which load at the farm and make local deliveries.

At the time of the accident giving rise to this proceeding, the tank farm was operated by a single employee, the terminal manager. The scheduling of pipeline deliveries would begin approximately three months prior to the actual delivery, with frequent updates. The terminal manager was required to be present at the farm one hour prior to each delivery to check the available capacity of each tank. He was then free to leave the facility during delivery but was required to return prior to the completion of each delivery. He could stop the product flow by a simple telephone call to either the local or Atlanta dispatcher. By this procedure Continental undertook to protect against the hazard of accidental overflows during product delivery at the farm.

On the morning of September 25, 1972, a truck driver was preparing to load his truck at the tank farm when he discovered a tank overflowing. He left the premises and notified the terminal manager and the police. Ross, the terminal manager, entered the terminal area against the advice of firefighters in an attempt to close the valves manually. An explosion and fire erupted, killing Ross and two workers in a nearby plant.

The Secretary charged that Continental violated the general duty clause of the Act because Continental did not provide automatic detection devices or manned delivery systems to protect against overflows. On August 10, 1973, an Administrative Law Judge vacated the general duty clause violation. On review, the Commission, with one seat vacant, affirmed this aspect of the ALJ's decision with a 1-1 vote. The Secretary petitioned this court for review and we remanded to the Commission upon motion of the Secretary. *Dunlop* v. *Continental Oil Co.*, No. 75-1961 (6th Cir. Oct. 17, 1977). On remand, the full Commission, one member abstaining, affirmed the citation with respect to the violation of the general duty clause.

The issue before this court is whether there is substantial evidence in the record to support the Commission's finding

that Continental violated the general duty clause of the Act, 29 U.S.C. § 654(a)(1), by failing to free its facility of the dangers created by product overflow; that is, by failing to employ automatic detection devices or manned deliveries to detect accidental overflows.

In establishing a violation of the general duty clause, it is incumbent upon the Secretary to prove "(1) that the employer failed to render its workplace 'free' of a hazard which was (2) 'recognized' and (3) 'causing or likely to cause death or serious physical harm.'"[1] *Empire-Detroit Steel* v. *OSHRC*, 579 F.2d 378 (6th Cir. 1978).

In its brief, Continental states that "it has never disputed the fact that spilled gasoline is hazardous," but contends that to establish a "recognized hazard" the Secretary must constitute that some action that Continental did or did not take is recognized as hazardous in the industry. However, Continental's admitted knowledge of the dangerous potential of spilled petroleum products is sufficient to establish a "recognized hazard." *Empire-Detroit Steel, supra*, 579 F.2d at 383; *Usery* v. *Marquette Cement Manufacturing Co.*, 568 F.2d 902, 910 (2d Cir. 1977); *Cape & Vineyard Div.* v. *OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *Brennan* v. *OSHRC (Vy Lactos Laboratories, Inc.)*, 494 F.2d 460, 463-64 (8th Cir. 1974).

The question of whether a hazard is recognized goes to the knowledge of the employer, or if he lacks actual knowledge, to the standard of knowledge in the industry – an objective test. *Marquette Cement Manufacturing Co., supra*, 568 F.2d at 910; *National Realty and Construction Company,*

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[1] 29 U.S.C. § 654(a)(1) reads in pertinent part:

§ 654. Duties of employer and employee

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Inc. v. *OSHRC*, 489 F.2d 1257, 1265, n.32 (D.C. 1973); 116 Cong. Rec. 38377 (1970); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv. L.R. 988, n. 37 (1973).

The Commission found that Continental recognized the hazards posed by overflows of this inherently dangerous product and that Continental was aware of a similar explosion at another tank farm which, like Continental, used an unmanned delivery system.

The question of the steps taken to alleviate the recognized hazard goes to the issue of whether the employer has "failed to render its workplace 'free' of [the] hazard." *National Realty, supra*, 489 F.2d at 1266-67. We must determine whether there is substantial evidence in the record to support the finding of the Commission that Continental did not render its workplace "free" of the hazard.

Just what an employer must do to render its workplace free of a recognized hazard has been the subject of much discussion. In *National Realty, supra*, 489 F.2d at 1265-66, the court said:

> Construing the term in the present context presents a dilemma. On the one hand, the adjective is unqualified and absolute: A workplace cannot be just "reasonably free" of a hazard, or merely as free as the average workplace in the industry. On the other hand, Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one. (Footnotes omitted.)

And, *id.* at 1265, n. 34:

> Though the Senate and House committee reports on the Act stated that the general duty clause incorporated "common law principles," the standard of care imposed by the clause was not characterized in terms of reasonableness. Rather, the reports speak of a
>
> general and common duty to bring *no* adverse ef-

> fects to the life and health of their employees throughout the course of their employment.

H.R.Rep.No.91-1291, *supra* note 7, at 21; S.Rep.No.91-1282, *supra* note 27, at 9, U.S. Code Cong. & Admin. News, 1970, p. 5186. (Emphasis added.) Overtones of the reasonableness standard are to be found only in the Act's definition of a *serious* violation, *see* note 41 *infra*. That employers must take more than merely "reasonable" precautions for the safety of employees follows from the great control which employers exert over the conduct and working conditions of employees. *See* H.R.Rep.No.91-1291, *id. and* S.Rep.No.91-1282, *id.*

The Secretary, in the citation issued to Continental charged that:

> The employer failed to furnish his employees working in the Southern Facilities Terminal on Jersey Pike in Chattanooga, Tennessee a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees in that:
>
> • • •
>
> (3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

The record shows that Continental's procedure for freeing the workplace of this hazard consisted of calculating the tank volume available for incoming products, having the tank farm manager on the premises one hour prior to each delivery and then requiring him to return to the farm prior to the completion of the delivery. Continental stresses that delivery could be shut down immediately by telephoning either of two dispatcher locations or manually shutting off the valves at the farm itself. It is evident that these procedures would

be fruitless if a tank overflow during the delivery period when the farm manager is not on the premises. The record also shows that other farms, but not necessarily all tank farms, utilized either manned delivery systems, high level alarms, or both.

As the court said in *National Realty, supra,* 489 F.2d at 1266, n. 37:

> This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation. The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Similarly, a precaution does not become infeasible merely because it is expensive. But if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promulated (sic) regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause.

See also Voegele Co., Inc. v. *OSHRC,* — F.2d — (No. 79-2439, 3rd Cir. June 26, 1980); *Ray Evers Welding Co.* v. *OSHRC,* — F.2d — (6th Cir. 1980), (No. 77-3581, Apr. 29, 1980); *General Dynamics Corp.* v. *OSHRC,* 599 F.2d 453 (1st Cir. 1979).

Further:

> Though the level of hazard *recognition* required by the 'general duty' clause is measured against industry employer knowledge . . . an abatement order under section 5(a)(1) may require that work practices and safety precautions be upgraded to a feasible level which is above that considered customary or 'reasonable' by an industry. (Citations omitted.) *Southern Railway Co.,* [1975-1976] CCH OSHD ¶ 20,091 (1975).

The record shows specific instances where some of the other tank farms in the industry employed delivery systems

or high level alarms, the safety precautions proffered by the Secretary. Witnesses for both the Secretary and Continental recognized the safety utility of these controls. The record establishes the feasibility and reasonableness of utilizing these controls either alone or in concert with each other. It also supports the conclusion that Continental's procedure was inadequate at the time of the accident.

We conclude that there is substantial evidence in the record to support the finding of the Commission that Continental violated the general duty clause of 29 U.S.C. § 654 (a)(1) by failing to free its facility of the dangers created by product overflow. Accordingly, the order of the Occupational Safety and Health Review Commission affirming the Secretary of Labor's citation is affirmed. .

No. 78-3445

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NOV 4 1980
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONTINENTAL OIL CO.	)	
	)	
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v.	)	ORDER
	)	
	)	
	)	
SECRETARY OF LABOR and OSH REVIEW COMMISSION	)	

Before KEITH, Circuit Judge, and PHILLIPS and CELEBREZZE, Senior Circuit Judges.

A majority of the judges of this court in regular active service having not voted in favor of en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that the petition be and hereby is denied.

Entered by order of the court.

John P. Hehman
CLERK

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 1829
CONTINENTAL OIL CO.,	:	
Respondent.	:	
	:	

DECISION

Before CLEARY, Chairman; BARNAKO, Commissioner.*

BARNAKO, Commissioner:

This case is before the Commission on remand from the United States Court of Appeals for the Sixth Circuit. Dunlop v. Continental Oil Co., No. 75-1961 (6th Cir. 1977). The Court directed us to reconsider and attempt to resolve our prior decision which, by an equally divided vote, affirmed an Administrative Law Judge's decision. Continental Oil Co., 75 OSAHRC 65/B4, 3 BNA OSHC 1225, 1974-75 CCH OSHD para. 19,717 (No. 1829, 1975). The Judge had held that the Respondent (Continental) did not violate the general duty clause (Section 5(a)(1)) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et. seq.).1/

* Commissioner COTTINE took no part in the consideration or decision of this case for the reasons set forth in his separate opinion.

1/ All other aspects of the case had been unanimously disposed of by the Commission. Neither party took exception to those aspects before the Court of Appeals.

The case arose following a fatal explosion and fire at Continental's petroleum storage tank farm outside of Atlanta. Under normal circumstances, a tank was filled by attaching a pipeline to the tank and then leaving the tank unattended for a predetermined length of time during which gasoline flowed into it. For unknown reasons this procedure malfunctioned on September 25, 1972. The pipeline did not shut off at the proper time and gasoline overflowed from the tank. George Douglas, a truck driver, spotted the escaping fuel when he arrived to load his delivery truck. He telephoned the terminal manager, Don Ross, who went to the tank farm and entered the facility in order to manually shut off the flow control valve from the pipeline into the tank. While he attempted to do so, a violent explosion occurred, killing him as well as two employees of a nearby rubber company.

The resulting citation alleged that the respondent violated Section 5(a)(1)[2/] of the Act in three respects including:

> (3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

2/ Section 5(a)(1) provides that:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The Judge vacated the citation. With respect to the above allegation, he concluded that since none of the suggested preventive devices, including manned receipt and automatic detection devices, were standard practice in the bulk petroleum storage industry, there was no "recognized hazard."

Former Commissioner Moran agreed with this reasoning. Chairman Cleary disagreed, and set forth the reasons why he would have reversed the Judge and found a violation of section 5(a)(1).[3/] Having carefully reviewed the entire record, we reverse the Judge and affirm the citation for the following reasons.

In order to establish a violation of section 5(a)(1), the Secretary must prove that:

> (1) the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm".

National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 (D.C. Cir. 1973). In this case, the record clearly establishes the second and third criteria listed above. As discussed more fully by Chairman Cleary in his initial decision, Continental recognized that the explosive vapors released by gasoline escaping from an overflowing tank posed a hazard to employees at its worksite. Indeed just a few months prior to the present tragedy, a storage tank at a nearby tank farm had overfilled and then erupted, killing one person. See Triangle Refineries, Inc., 73 OSAHRC

3/ Both members agreed with the Judge's conclusion that Continental did not violate the general duty clause for the other reasons alleged in the citation. The Secretary did not take exception to these aspects of the Commission's decision before the Sixth Circuit. Accordingly, we need consider only that allegation of the citation concerning the use of automatic detection devices or persons.

9/A14, 1 BNA OSHC 3050, 1971-73 CCH OSHD para. 15,454 (No. 1008, 1973)(ALJ). The record shows that Continental officials were well aware of the circumstances surrounding that explosion and knew that the neighboring storage tank farm, like its own, followed a procedure called "unmanned delivery" in filling its tanks. Additionally the record is uncontroverted that death or serious injury could result from the hazard created by an overflowing tank.[4/]

The only remaining question then is whether Continental rendered its workplace "free" of the hazard. The Secretary suggested a manned delivery procedure, coupled with the usage of high level alarms, to prevent massive overflows such as occurred here. As noted above Judge Patton vacated the citation, however, because such devices were not recognized by the industry as a necessity for safe operations.

In National Realty & Construction Co., supra, the court addressed the question of what an employer must do to render its worksite "free" of a recognized hazard. In addressing this duty, the court stated that the hazard must be one which is preventable and defined preventability as follows:

> This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation. The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Id at footnote 37, p. 1266.

4/ Respondent's company truck driver Douglas was exposed to the hazard when he drove up to the tank farm to load his delivery vehicle.

We adhered to this rationale in Southern Railway Co., 75 OSAHRC 88/C2, p.3, 3 BNA OSHC 1657, 1658, 1975-76 CCh OSHD para. 20,091 (No. 5960, 1975); wherein we stated, "Though the level of hazard recognition required by the 'general duty' clause is measured against industry employer knowledge....an abatement order under section 5(a)(1) may require that work practices and safety precautions be upgraded to a feasible level which is above that considered customary or 'reasonable' by an industry." (citations omitted) Southern Railway Co., supra, at 23,897.

The evidence of record, described by Chairman Cleary in the Commission's initial decision, establishes that a manned delivery system and high level alarms are reasonable and feasible methods of preventing tank spills. National Realty & Construction Co., supra, at 1266. Not only did Exxon, another company operating petroleum storage facilities, have high level alarms and follow the manned delivery procedure at one site, but the Secretary's area director, who had experience in the petroleum industry, as well as one of Continental's own witnesses recognized the safety utility of these controls. In such circumstances, we hold that the Secretary has demonstrated the feasibility of the suggested abatement method and affirm the citation.

The Secretary proposed a penalty of $700. We recognize the large size of the employer and the high gravity of the violation. The company, however, after the Triangle Refineries incident, had taken initial steps to increase safety at its facility. While these actions were inadequate, they demonstrate Continental's good faith. Kent Howlin Constr., Inc.,

77 OSAHRC 22/A2, 5 BNA OSHC 1051, 1977-78 CCH OSHD para. 21,550 (No. 9483, 1977), appeal filed, No. 77-1258 (10th Cir. April 18, 1977). We conclude that a penalty of $500 is appropriate.

The citation for a violation of section 5(a)(1) of the Act is affirmed and a penalty of $500 is assessed.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUL 20 1978

Commissioner COTTINE filing a separate opinion:

As a new member of the Commission, I must resolve the issue of my participation in pending cases. It is also necessary for me to set out the principles guiding my decision on this important issue.

In this case, Chairman Cleary and Commissioner Barnako reached a unanimous decision on the merits before I received by commission on May 1, 1978. A decision was already in preparation when I assumed office. I have concluded that the wisest exercise of discretion is to decline to participate in this case even though a new Commission member has authority to participate in pending cases. It should be emphasized that by declining to participate I express no opinion on the procedural or substantive issues in this case or on the appropriateness of the accompanying order.

Discretion of Commission Members

As a matter of law, it is not necessary for all Commission members to participate for an agency to take official action. In Drath v. FTC, 239 F.2d 452 (D.C. Cir. 1956), cert. denied, 353 U.S. 917 (1957), the Federal Trade Commission issued a cease-and-desist order with only three of its five members participating. The Court of Appeals rejected petitioner's contention that the FTC can act in its adjudicatory capacity only when all members participate, except when there is a vacancy. The court ruled that official action can be taken by the

majority of the requisite quorum. Also Frischer & Co. v. Bakelite Corp., 39 F.2d 247 (C.C.P.A. 1930), cited approvingly in FTC v. Flotill Prod. Inc., 389 U.S. 179, 182-183 (1967). Similarly, section 12(f) of the Occupational Safety and Health Act, 29 U.S.C. § 661(e), provides:

> For the purposes of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

Thus, the unanimous decision already reached in this case satisfies the quorum and official action requirements of the Act and my participation is not necessary for the Commission to carry out its adjudicatory functions in this particular case.

However, it is also settled that a new member of an administrative agency may participate in pending cases. For example, a new member of the Civil Aeronautics Board who had not participated in previous proceedings was entitled to vote and break an existing tie where he had familiarized himself with the record. Western Air Lines v. CAB, 351 F.2d 778 (D.C. Cir. 1965), citing United Air Lines v. CAB, 281 F.2d 53 (D.C. Cir. 1960). 1/ In United the court indicated that, where a member voting with the majority without hearing oral argument "had the record before him and the benefit of briefs", there was no abuse of

1/ A Commissioner may vote simply to avoid an impasse. Public Service Commission of State of N.Y. v. FPC, 543 F.2d 757, 777 (D.C. Cir. 1974). See generally Screws v. United States, 325 U.S. 91, 134 (1945)(Rutledge, J., concurring in result).

discretion in his participation. 281 F.2d at 56. There are numerous other cases supporting this holding. The clearest statement of law is set forth in Gearhart & Otis, Inc. v. SEC, 348 F.2d 798 (D.C. Cir. 1965):

> The decisions of numerous courts and administrative agencies establish that, even without agreement of the parties, a member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him. [footnotes omitted]

348 F.2d at 802. 2/ See Au Yi Lau v. U.S. Immigration and Naturalization Service, 555 F.2d 1036, 1042 (D.C. Cir. 1977); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 182 & n.8 (2d Cir. 1976). Thus, a new member possesses the necessary authority to participate in all cases pending before the Commission on assuming office.

Though a new member may participate in all pending cases, particularly those involving an impasse, the decision remains a matter of discretion since adjudicatory decisions may be upheld on a majority of a quorum. In FTC v. Flotill Prod., 389 U.S. 179 (1967), rev'g 358 F.2d 224 (9th Cir. 1966), an FTC member appointed to fill one of two vacancies declined to participate because he had not heard the oral argument. Thus, three of the possible four Commissioners actually participated in the decision. As a result, the FTC issued a cease-and-desist order based on

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2/ The Court distinguished WIBC, Inc. v. FCC, 259 F.2d 941 (D.C. Cir.), cert. denied, sub nom. Crosley Broadcasting Corp. v. WIBC, Inc., 358 U.S. 920 (1958), because oral argument was statutorily required if a party requested it. 348 F.2d 798, 802 n. 14.

the affirmative vote of only two members. Despite its obvious impact on the number of members constituting a majority, the Court did not review the exercise of discretion by the new member. Instead, the Court accepted the abstention at face value and upheld the action of the two members of the FTC. See also LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966); Atlantic Refining Co. v. FTC, 344 F.2d 599 (6th Cir. 1965). In addition, administrative decisions involving two or more abstentions have been upheld by reviewing courts without question or comment on the grounds for these abstentions. All that was necessary to sustain the agency decision was a majority of the required quorum. E.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 848, 861 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

Decision Not to Participate

I decline to participate in this case because a majority of the Commission has reached agreement on the merits and my vote would have no effect on the outcome. Moreover, in cases where Chairman Cleary and Commissioner Barnako have reached a unanimous decision, my participation would delay the issuance of decisions and conflict with the goal of a prompt and efficient decision-making process. See generally Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 97 S.Ct. 1261, 1272 (1977); Keystone Roofing Co., Inc. v. OSHRC, 539 F.2d 960, 964 (3d Cir. 1976); Nader v. FCC, 520 F.2d 182, 205-207 (D.C. Cir. 1975), citing 5

U.S.C. § 555(b). Since abatement is stayed until the Commission enters a final order, 29 U.S.C. § 659(b), additional deliberations would delay the control of hazardous working conditions in any case where the Commission has determined that a violation of the Act exists. That result would be inconsistent with the statutory purpose to assure so far as possible safe and healthful working conditions for every working man and woman. 29 U.S.C. § 651(b).

I will, however, participate fully in all cases in which previous Commission deliberations have resulted in a one-to-one deadlock. Decisions by an equally divided Commission are without precedential value, e.g., Life Sciences Products Co., 77 OSAHRC 200/A2 (microfiche), 6 BNA OSHC 1053, 1977-78 CCH OSHD ¶ 22,313 (No. 14910, Nov. 11, 1977), appeal filed, No. 77-1014 (4th Cir. Jan. 6, 1978), and, therefore, do not serve as guidance to the Commission's administrative law judges. Moreover, these decisions also promote needless litigation in the U.S. Courts of Appeals to decide issues which should initially be determined by the Commission because its members have specialized training, education, and experience in occupational safety and health. 29 U.S.C. § 661(a). See generally Atlas Roofing Co. v. OSHRC, supra at 1264, 1272; Keystone Roofing Co., Inc. v. OSHRC, supra at 963-964. Administrative resolution of pending issues also promotes a more uniform application and development of occupational safety and health law. After reading the record, I will participate in the consideration and decision of these cases.

Conclusion

My decision not to participate in pending cases which have reached a unanimous decision by my colleagues, but to participate in those cases with unresolved issues, promotes the prompt adjudication of cases. The full benefit of Commission review is also assured the parties and the public. Both of these results are essential to protecting the lives, health and safety of American workers and the operation of American business while providing for the effective adjudication of cases by the administrative law judges.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 1829
CONTINENTAL OIL COMPANY, (SOUTHERN FACILITIES TERMINAL),	:	
Respondent.	:	

DECISION

Before MORAN, Chairman; and CLEARY, Commissioner.

CLEARY, Commissioner:

This case is before the full Commission on separate directions for review ordered by former Commissioner Van Namee and myself.

I directed review on the issue of: Does the evidence of record support the conclusion that respondent is in violation of section 5(a)(2) of the Act by failing to comply with the standard at 29 CFR §1910.106(b)(2)(vii)(b)(2).

Former Commissioner Van Namee ordered review on the issue of: Whether respondent's instructions regarding situations of the type evidenced by this case constituted compliance with the requirements of section 5(a)(1) in view of the industry's experience with the effectiveness of said instructions. That is, was this respondent on notice that its instructions were inadequate such that it violated section 5(a)(1)?

The orders to the parties invited them to file exceptions to the Judge's decisions on additional issues. The Secretary has excepted to the Judge's decision to the extent that it vacated citations.

The case arose as a result of a fire and explosion at the Chattanooga facility of the Continental Oil Company on September 25, 1972. One of the facility's six petroleum storage tanks overflowed, and spilled into a diked area surrounding the tanks. Continental's terminal manager, who attempted to stop the pipeline flow, was killed. Two employees of the Firestone Fire and Rubber Company working in a building adjacent to the facility were also killed.

Six citations were issued to Continental. These are summarized as follows:

Non-serious citation:

29 CFR §1910.106(b)(2)(vii)(c)(5). Failure to provide a drain of a uniform slope.

Serious citations:

Number 1. 29 CFR §1910.106(f)(8). Failure to provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank.

Number 2. 29 CFR §1910.106(b)(2)(vii)(b)(2). Failure to provide a drainage system.

Number 3. 29 CFR §1910.106(b)(2)(vii)(b)(3). Drainage from the diked area was discharged into adjoining property and public drains which emptied into natural watercourses.

Number 4. Section 5(a)(1) of the Act, the general duty clause. An employee was required to enter the terminal to work when vapor laden air was hazardous to the employee; remote devices were not provided to cut off the flow of gasoline; and automatic detection devices or persons were not employed to detect overflowing tanks.

Number 5. 29 CFR §1910.106(b)(2)(vii)(c)(7)(i). The diked area was not subdivided by drainage channels.

The cited standards are attached as an "Appendix A" to this decision. Judge Patton vacated all but serious citation No. 2.

THE FACTS

Continental's tank farm was serviced by Colonial Pipeline Company. Colonial had a centralized dispatching facility in Atlanta, Georgia, a pumping station near East Ridge, Georgia, and a local dispatching facility near Continental's tank farm. Continental employed its terminal manager to operate the tank farm. Colonial employed one dispatcher to operate the Atlanta facility, and a second dispatcher to operate the local facility.

Continental used a procedure called "unmanned delivery" in filling its tanks. The length of time necessary to fill the tank was calculated, and when the starting time was known the stopping time was determined. Because the filling would take several hours, the terminal manager could leave the terminal after the filling began and return before it ended.

The terminal manager started or stopped the pipeline flow by calling the local dispatcher. The local dispatcher coordinated the instructions with the Atlanta dispatcher. Having control over the entire system, the Atlanta dispatcher could start or stop the pipeline flow. A toll-free telephone number was provided to communicate with the Atlanta dispatcher. Both the local dispatcher and Continental's terminal manager had this number. Collect calls were also accepted. Once the Atlanta dispatcher was contacted, the pipeline flow could be started or stopped instantaneously. With this method of controlling the pipeline flow, manually operated valves were located at the terminal and the local dispatching facility. But these valves were not used in daily operations.

Continental provided safety instructions for its employees that included written "Emergency Procedures" concerning product leaks. Also Continental's district manager conducted a safety meeting that emphasized the methods of shutting off the pipeline flow in the event of spills or leaks, including calling the dispatchers. This meeting was held after a previous tank fire at Doraville, Georgia. See Triangle Refineries, Inc., No. 1008 (March 7, 1973) (Administrative Law Judge). Continental's terminal manager attended this safety meeting.

Before the explosion, the local fire department had been summoned to the tank terminal. The fire chief observed an unidentified man in a green worksuit, apparently the terminal manager, unlock the terminal gates, enter the terminal, and go toward the valve manifold. The chief told the unidentified man that he would have to wear self-contained breathing apparatus on account of the fumes. The man ignored the warning, and said he was going to shut off a valve. The chief and his assistant also entered the terminal, and the chief observed the overflow. He and his assistant then left the terminal, and subsequently the explosion occurred.

After the explosion, electric power failed at the local pipeline dispatching facility. Because of the power loss, a pressure regulator control valve at the local facility automatically closed. This valve was not a positive seal, and did not completely stop the pipeline flow. However, it considerably reduced the flow. Thereafter, the local dispatcher went to the terminal, and manually closed off the facility. The Atlanta dispatcher's ability to control the entire system and stop the pipeline flow after the power failure is unclear from the record.

THE DRAINAGE CITATION

Serious citation No. 2 alleged that Continental failed to provide a drainage system that terminated in vacant land or an impounding basin in non-compliance with the standard at 29 CFR §1910.106(b)(2)(vii)(b)(2). The Judge found that respondent did not provide a basin for drainage, and affirmed the citation.

The standards governing tank farms require that either of two methods be used to retain accidentally discharged liquids. Section 1910.106(b)(2)(vii)(a) states the following:

> §1910.106(b)(2)(vii) Drainage, dikes, and walls for aboveground tanks.
>
> (a) Drainage and diked areas. The area surrounding a tank or group of tanks shall be provided with drainage as in subdivision (b) of this subdivision, or shall be diked as in subdivision (c) of this subdivision, to prevent accidental discharge of liquid from endangering adjoining property or reaching waterways.

With drainage, drains surround the tanks to carry away spilled liquids to vacant land or an impounding basin. See 29 CFR §1910.106(b)(2)(vii)(b). With diking, a dike is built around the tank farm to retain discharged liquids within it. See 29 CFR §1910.106(b)(2)(vii)(c).

The Secretary concedes that an employer must comply with either the diking or the drainage standards, but not both. The Secretary argues that Continental failed to comply with both the

diking and the drainage standards. He argues that separate citations, some for non-compliance with the drainage standards and others for non-compliance with the diking standards, should be affirmed.

We reject the Secretary's argument. The standard requires either diking or drainage. To affirm citations alleging non-compliance with both the diking and the drainage standards, as urged by the Secretary, assumes that both diking and drainage are required. The assumption is erroneous because it ignores the alternative requirement of diking or drainage. When an attempt is made to comply with one method, a citation for not complying with the other method is an abuse of discretion.

Continental surrounded its tanks with a dike. The photographic evidence shows the dike; the witnesses referred to it; and the Secretary has referred to it in the citation, the complaint, and his brief. Thus, only the diking standards apply to Continental in this case, and compliance with the drainage standards is not required. Serious citation No. 2 alleged non-compliance with a drainage standard. It is therefore vacated.

Continental argues that the above-quoted standard at 29 CFR §1910.106(b)(2)(vii)(a) has no relationship to the health and safety of employees. I disagree. On October 10, 1972, the Secretary issued an interpretation of this standard. In this interpretation the Secretary acknowledges that the primary and express purpose of

t' s standard is to avoid harm to adjoining property and waterways. The interpretation is attached as "Appendix B." The Secretary's interpretation also states that any safety benefits to employees is secondary. In his argument before us, the Secretary notes the Directive's conclusion that each case "will be considered on its own merits," and he asserts that the merits of this case require compliance.

There is some doubt as to whether the Commission is empowered to consider the standard as being anything but what it purports to be on its face, an occupational safety and health standard issued under section 6(a) of the Act. See U.S. Steel Corp., Nos. 2975 and 4349 (November 14, 1974). But because of a lack of any judicial ruling in this regard and because of the Secretary's interpretation, I have considered the application of the standard in light of the record concerning its secondary purpose, protecting employees. One of respondent's witnesses testified that compliance would not benefit employee safety, while the compliance officer testified differently. The evidence does show clearly however that containment of a spill would confine the dangerous spilled product to one area. The containment would protect statutory employees generally outside of the containment area who may not be identifiable. Cf. Brennan v. O.S.H.R.C. & Underhill Constr. Corp., Nos. 74-1568 & 74-1579 (2d Cir., March 10, 1975). Thus compliance with the standard does beneficially serve employee safety.

FIRE CONTROL

Serious citation No. 1 charged Continental with failing to provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank. The cited standard states:

§1910.106 Flammable and combustible liquids.

* * *

(f) Bulk plants.

* * *

> (8) Fire control. Suitable fire-control devices, such as small hose or portable fire extinguishers, shall be available to locations where fires are likely to occur. Additional fire-control equipment may be required where a tank of more than 50,000 gallons individual capacity contains Class I liquids and where an unusual exposure hazard exists from surrounding property. Such additional fire-control equipment shall be sufficient to extinguish a fire in the largest tank. The design and amount of such equipment shall be in accordance with approved engineering standards.

The Judge vacated this citation because fire control equipment sufficient to extinguish a fire in Continental's largest tank did not exist, and therefore compliance would be an impossibility.

The Secretary excepts to the Judge's finding arguing that evidence of fixed foam protection systems was not properly considered by the Judge.

At the hearing, the Secretary's attorney read from the Fire Protection Manual published by the National Fire Protection Association. The excerpts he quoted concerning foam discharge outlets on the tanks, fixed piping and pumps for the outlets, and a central foamhouse or connections for external foam generators a safe distance from the tanks, were admitted into evidence. I consider this evidence adequate to show that equipment sufficient to extinguish a fire in the largest tank does exist. See also 7 National Fire Protection Association, National Fire Codes, Alarm & Special Extinguishing Systems, pp. 11-32 to 11-42, §§301-356 (1972-73). I agree with the Secretary that compliance was possible.

I would vacate this citation, however, because additional equipment sufficient for a fire in the largest tank was not required in the standard. The standard is basically a regulatory rule of reason. It requires "suitable fire control" for small fires, and provides additional equipment "may be required" if an "unusual exposure hazard exists from surrounding property." The Secretary contends that freight trains loaded with TNT passing the tank farm and airplanes flying overhead were unusual exposure hazards. The contention goes against the weight of the evidence as to the difficulty in detonating TNT. Airplanes flying overhead do not pose a hazard "from surrounding property" under the standard.

DRAINAGE FROM DIKED AREAS

Non-serious No. 1 alleged that Continental failed to provide a drain of not less than one percent away from the tank toward a sump, drain box, or other safe means of disposal in non-compliance with the standard published at 29 CFR §1910.106(b)(2)(vii)(c)(5). It was stipulated that Continental provided a drain with a slope of approximately two percent away from the tank. In excepting to the Judge's finding on this item the Secretary asserts that Continental failed to provide a sump or other means of disposal.

The compliance officer testified that he did not see a sump, drain box or other means of disposal. Continental's general manager of operations, however, testified that a sump or low point was located within the diked area. The working drawings of Continental's terminal show the existence of a low point or sump in one corner of the diked area. The photographic evidence also shows that the liquids within the diked area accumulated in the sump area. Weighing the evidence, we find that Continental provided a sump as required by the cited standard.

The Secretary also contends that location of a sump within the diked area "aggravates the hazard and hardly constitutes a safe means of disposal since the gas is pooled around the tanks, thereby enhancing the danger of an expanding fire and explosion." In other words, the Secretary argues that the sump should have been located outside of the diked area. The cited standard, however, requires only that it be located, "at the greatest practical distance from the tank." Continental has located the sump at one corner of the diked area. To have the sump beyond the diked area would create an area having a wider dispersion of flammable liquids. Continental's placement of the sump was as far as practical from the tanks under the circumstances.

The vacation of non-serious No. 1 is therefore affirmed.

DRAINAGE CHANNELS WITHIN THE DIKED AREA

Serious citation No. 5 alleged that the diked area was not subdivided by drainage channels or intermediate channels in non-compliance with the standard published at 29 CFR §1910.106(b)(2)(vii)(c)(7)(i). Continental admitted that it did not provide intermediate curbs, hence the issue is whether the diked area was subdivided by drainage channels.

The construction drawings for the terminal included drainage channels within the diked area. The compliance officer testified, however, that in inspecting after the fire, he did not find any drainage channels. There was a possibility of erosion and washing of the ditches as a result of water and foam used to extinguish the fire. The Judge found the existence of the ditches from his examination of an aerial photograph of the terminal. The construction drawings show a plan for the inclusion of

the channels within the diked area. The aerial photograph suggests that the plan was executed in this respect. We therefore agree with the Judge that the preponderance of the evidence does not show an absence of the drainage channels. The vacation of serious citation No. 5 is affirmed.

THE "GENERAL DUTY" CITATION

Serious citation No. 4 alleged that respondent violated section 5(a)(1) of the Act, the "general duty" clause. The complaint described the alleged violation as follows:

> (1) Employee was required to enter the premises of said terminal to work where vapor laden air was hazardous to the employee.
>
> (2) Remote devices were not provided for cutting off gasoline pumps in emergency conditions and
>
> (3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

The Judge vacated this citation. I would affirm this citation while Chairman Moran would agree with the Judge's disposition. Inasmuch as this case has been before the Commission for over 1 1/2 years, the Commission has agreed to decide it at this time, rather than delaying the disposition until a third member is appointed to the Commission.

Accordingly, the Judge's vacation of this citation is affirmed by an equally divided Commission. This portion of our decision has no

precedential weight. Neil v. Biggers, 409 U.S. 188 (1972). My views on this issue follow. I would also add that the Judge's decision correspondingly has little precedential value because of the unique facts and I have the hope, if not the expectation, that the employer will take voluntarily the corrective measures that I suggest in this opinion.

Chairman Moran's views are stated in his concurring opinion.

In order to find a violation of the general duty clause:

> [T]he Secretary must prove (1) that the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm."

National Realty & Constr. Co., Inc. v. O.S.H.R.C., 489 F.2d 1257, 1265 (D.C. Cir. 1973). A violation occurs whenever an employer fails to take reasonable precautionary steps to protect his employees from reasonably foreseeable recognized hazards. Brennan v. O.S.H.R.C. & Vy Lactos Laboratories, Inc., 494 F.2d 460, 463 (8th Cir. 1974); cf. National Realty, supra at 1265, n.34.

Actual knowledge on the part of an employer of a hazard causing or likely to cause death or serious physical harm, however, is sufficient to find that the hazard is a "recognized hazard." Vy Lactos Laboratories, supra. If an employer fails to render a workplace free of a generally known and recognized hazard of a particular industry, a violation of the general duty clause will also be found. American Smelting & Refining v. O.S.H.R.C., 501 F.2d 504 (8th Cir. 1974). In any event, the standard used in determining the existence of a recognized hazard would be "the

knowledge of safety experts who are familiar with the circumstances of the industry or activity in question." National Realty, supra at 1265, n.32.

Continental argues that there is no proof that a recognized hazard exists when petroleum products spill or leak near large storage tanks. I disagree. Continental's "Emergency Procedures" refer to a spill as a hazard, and Continental concedes that the vapor caused by a spill is a hazard. Many of the safety precautions taken by the petroleum industry are directed toward preventing or working safely with leaks or spills. For instance, Continental's "Product Terminal Operating Procedure Guide" instructs employees at tank car loading racks to "use extreme caution in moving about where the product has been spilled." Continental's "Emergency Procedures" are also written to instruct employees in handling product leaks. Furthermore, it is evident from Continental's safety meeting after the Doraville fire that it had actual knowledge that tank spills were hazards likely to cause death or serious physical harm, further evidence of a recognized hazard.

Concerning the likelihood of serious physical harm, Judge Patton stated:

> There is no question that it is recognized that fuel escaping from a storage tank is a very real and definite hazard. Statistics introduced in evidence established that there are approximately three and one-half fatalities for every fire of this nature which has occurred.

I agree with the Judge and would find that death or serious physical harm are likely to result from a spill.

The remaining question is whether Continental took reasonable precautionary steps to protect its employees from the recognized hazard. I will consider this question under the factual allegations of each numbered paragraph of the citation.

Paragraph (1)

The Secretary alleged that the terminal manager was "required" to enter the terminal and shut off the manually operated valves in violation of section 5(a)(1) of the Act. The Secretary notes that Continental's "Emergency Procedures" state "Isolate the hazard as much as possible by closing valves. . ." and "locate the source of the leak and . . . stop the flow of product if safely possible." He also notes that the procedure of telephoning the pipeline dispatchers with a request that they shut off the pipeline flow was not in the written "Emergency Procedures." The Secretary argues from these facts that the emergency procedure was to close the manual valves and not to telephone the pipeline company. I disagree.

Continental's "Emergency Procedure" states:

> Some of the points listed below will apply to some instances and not to others. These are only guidelines. They are not absolute (emphasis added).

Additionally, Continental's terminal manager was familiar with the emergency procedures. He had 13 years' experience as a pipeline dispatcher and terminal operator, and he attended the safety meeting emphasizing the procedure of calling the Atlanta dispatcher.

Continental's emergency instructions contained reasonable precautionary steps designed to stop the pipeline flow after a spill. The Secretary argues that the terminal manager had no choice but to enter the terminal to stop the pipeline flow. This argument is not supported by the evidence of record. The explosion occurred at 6:38 a.m., and the power failed at the local pipeline dispatching facility at 6:40 a.m. Earlier, telephone and electric power service were operational, and the Atlanta dispatcher had full control of the system. The terminal manager could have called either the Atlanta dispatcher or the local dispatcher, as he had been instructed. In short, I do not find that the terminal manager was "required" to enter the terminal as alleged, nor do I find that Continental failed to act reasonably in instructing its employees how to handle safety tank spills. The citation alleging a violation of section 5(a)(1) of the Act cannot be affirmed on the allegations contained in subsection (1) of the citation.

Paragraph (2)

The Secretary asserts that "Remote devices were not provided for cutting off gasoline pumps in emergency conditions."

It is not clear what kind of remote shut-off devices the Secretary considers necessary. Testimony was presented that remote devices could be triggered either by high level alarms on the tanks or by vapor-sensing devices within the terminal. Testimony was also presented that the signal generated by these devices could be used to activate shut-off valves at any place or alarms at the Atlanta dispatching facility.

Also, the Secretary has not commented on evidence that if the valves were closed they could cause pipeline ruptures. The pipelines operate at a pressure of 2,000 pounds per square inch, and it is understandable why a sudden valve-closing could cause ruptures. The possibility of ruptures places in doubt the reasonableness of "emergency remote control valves." The evidence does not demonstrate that they are a reasonable and acceptable method of preventing tank spills.

Additionally, the Secretary has not presented sufficient evidence to demonstrate the reasonableness of remote controlled signals to the central pipeline dispatching facility. Insufficient evidence has been presented as to the method of installation, such as by telephone lines or radio circuits. Accordingly, I conclude

that the proof in support of paragraph (2) is insufficient.

Paragraph (3)

Paragraph (3) alleged that Continental failed to use automatic detection devices or persons to detect the overflow. During the hearing the Secretary referred to automatic detection devices as either high level alarms that would signal the full state of a tank, or vapor-sensing devices that would signal the presence of a high vapor level. Continental had neither of these devices.

The evidence shows that vapor-sensing devices are usually used in enclosed areas and that they would not be reliable at a tank terminal because of the changing atmospheric conditions. Due to winds, rain, snow, and fog these devices may fail to detect any vapors present. One of respondent's witnesses, who had designed 25 terminal facilities, testified that even with 100 of these devices present at a tank terminal he would not depend upon their reliability. The Secretary has not met his burden of proof in showing that these devices would be an effective method of aiding in the prevention of overflows.

The Secretary has proved a "general duty" clause violation, however, under the theory that Continental failed to use high level alarms and failed to follow a manned delivery procedure, that is, a procedure under which an employee is present at all times during

a pipeline delivery. 1/ Proof that other employers use safety measures advocated by the Secretary as methods of preventability is strong evidence that these methods are demonstrably feasible and usable measures necessary to prevent human error or hazardous conduct by employees. A superintendent of the Exxon Company testified that Exxon had high level alarms at Chattanooga, Birmingham, and Knoxville. He also testified that a manned delivery procedure was followed at the Exxon Chattanooga terminal for safety as well as quality control. The Secretary's area director had experience in the petroleum industry, and considered manned delivery procedures and high level alarms necessary for safety reasons. Furthermore, one of Continental's witnesses, a safety engineer, testified that when high level alarms are used, "It is a fail-safe operation if they've got personnel there. . . ." Thus it is clear that high level alarms, together with a manned delivery procedure constitute feasible methods to prevent tank spills. These methods of

1/ Although the pleadings in paragraph (3) alleged a failure to use automatic detection devices or persons to detect the overflow, I believe that the case was tried under the theory that the conjunctive "and" instead of "or" was intended. High level alarms would be useless in an unmanned delivery operation because nobody would be present to hear the alarm.

preventability are reasonable precautionary steps that would protect employees from the recognized hazard of tank spills. I believe that it is imperative that employees be protected by these methods in order to assure "so far as possible" the safe working conditions that Congress intended in passage of the Act. See section 2(b) of the Act; Brennan v. O.S.H.R.C. & Hanovia Lamp Div., Canrad Precision Indus., 502 F.2d 946 (3d Cir. 1974); REA Express, Inc. v. Brennan, 495 F.2d 822 (2d Cir. 1974).

The Judge, however, did not apply the "general duty" clause for essentially three reasons: (1) the affirmance of a general duty citation would be improper because the Commission would in effect be promulgating a standard (pages 33-34, 36); (2) the absence of high level alarms, together with Continental's unmanned delivery procedure was not a "recognized hazard" (page 37); and (3) that, although some companies do have high level alarms and some companies do follow a manned delivery procedure, a majority of companies in the industry do not (pages 35-36).

The "general duty" clause provides protection under the Act when safety standards have not been adopted. Brennan v. O.S.H.R.C. & Interstate Glass Co., 487 F.2d 438, 439 (8th Cir. 1973). The Secretary cannot be expected to adopt safety or health standards for every conceivable hazardous employment situation. The Judge's conclusion

that the application of the general duty clause in this case is in effect an adoption of a regulatory standard is plainly wrong. This is adjudication under a broad legislative standard to be sure. But it is not administrative rulemaking. See Brennan v. O.S.H.R.C. & Hanovia Lamp Div.,Canrad Precision Indus., supra at 950-951; cf. American Smelting & Refining, supra at 511-512; see also K. Davis, Administrative Law Text, §5.03 at 126-31 (3d ed. 1972).

Also, the Judge erroneously assumed that the absence of methods of prevention, i.e., manned delivery procedures together with high level alarms, must by itself constitute a "recognized hazard." See page 33 of his decision. A "recognized hazard," however, is one thing, and a lack of methods of prevention is another. In this case, it was proved that a tank spill is a "recognized hazard." It was also proved that the Continental facility lacked the methods of prevention urged by the Secretary. The Secretary proved that these methods were reasonable and feasible in preventing tank spills. He has met his burden of proof. National Realty, supra.

Finally, it is not necessary that a majority of employers follow methods of prevention advocated by the Secretary before a "general duty" violation can be found. It is only necessary that these methods be reasonable. Vy Lactos Laboratories, supra.

Accordingly, serious citation No. 2 is vacated. The Judge's decision is affirmed in all other respects.

FOR THE COMMISSION

William S. McLaughlin
Executive Secretary

DATED: JUN 9 1975

APPENDIX A

§1910.106 Flammable and combustible liquids.

* * *

(b) Tank storage.

* * *

(2) Installation of outside aboveground tanks.

* * *

(vii) Drainage, dikes, and walls for aboveground tanks.

(a)The area surrounding a tank or a group of tanks shall be provided with drainage as in subdivision (b) of this subdivision, or shall be diked as provided in subdivision (c) of this subdivision, to prevent accidental discharge of liquid from endangering adjoining property or reaching waterways.

(b) Drainage. Where protection of adjoining property or waterways is by means of a natural or manmade drainage system, such systems shall comply with the following:

* * *

(2) The drainage system shall terminate in vacant land or other area or in an impounding basin having a capacity not smaller than that of the largest tank served. This termination area and the route of the drainage system shall be so located that, if the flammable or combustible liquids in the drainage system are ignited, the fire will not seriously expose tanks or adjoining property.

(3) The drainage system, including automatic drainage pumps, shall not discharge to adjoining property, natural water courses, public sewers, or public drains unless the discharge of flammable or combustible liquids would not constitute a hazard, or the system is so designed that it will not permit flammable or combustible liquids to be released.

(c) Diked areas. Where protection of adjoining property or waterways is accomplished by retaining the liquid around the tank by means of a dike, the volume of the diked area shall comply with the following requirements:

* * *

(5) Where provision is made for draining water from diked areas, drainage shall be provided at a uniform slope of not less than 1 percent away from tanks toward a sump, drainbox, or other safe means of disposal located at the greatest practical distance from the tank. Such drains shall normally be controlled in a manner so as to prevent flammable or combustible liquids from entering natural water courses, public sewers, or public drains, if their presence would constitute a hazard. Control of drainage shall be accessible under fire conditions.

* * *

(7) Each diked area containing two or more tanks shall be subdivided preferably by drainage channels or at least by intermediate curbs in order to prevent spills from endangering adjacent tanks within the diked area as follows:

(1) When storing normally stable liquids in vertical cone roof tanks constructed with weak roof-to-shell seam or approved floating roof tanks or when storing crude petroleum in producing areas in any type of tank, one subdivision for each tank in excess of 10,000 bbls. and one subdivision for each group of tanks (no tank exceeding 10,000 bbls. capacity) having an aggregate capacity not exceeding 15,000 bbls.

* * *

(f) Bulk plants.

* * *

APPENDIX A

(8) Fire control. Suitable fire-control devices, such as small hose or portable fire extinguishers, shall be available to locations where fires are likely to occur. Additional fire-control equipment may be required where a tank of more than 50,000 gallons individual capacity contains Class I liquids and where an unusual exposure hazard exists from surrounding property. Such additional fire-control equipment shall be sufficient to extinguish a fire in the largest tank. The design and amount of such equipment shall be in accordance with approved engineering controls.

* * *

INTERPRETATION

October 10, 1972

STANDARD PROVISION: 29 CFR 1910.106(b)(2)(vii)

SUBJECT: Drainage, Dikes, and Walls for Aboveground Tanks

1. Purpose. To clarify the applicability of 1910.106(b)(2)(vii) and to direct answers to inquiries.

2. Background. This paragraph establishes the requirements for drainage facilities or dikes for the area surrounding aboveground flammable liquid storage tanks. Numerous requests for clarification, objections to, and informal petitions for deletion of the subject requirement have been received on the basis that it is concerned primarily with public safety and property damage and not employee safety.

3. Interpretation. The primary and expressed purpose of the standard, is to avoid harm to adjoining property and to waterways. Any resulting benefit to the safety and health of employees appears to be secondary. Therefore, paragraph 1910.106(b)(2)(vii) is not intended to apply where its requirements do not have a substantial relationship to the safety and health of employees. Each case will have to be considered on its own merits.

MORAN, Chairman, Concurring:

I concur in vacating the citation for a violation of 29 C.F.R. § 1910.106(b)(2)(vii)(b)(2) for the reasons stated by Commissioner Cleary. I would affirm Judge Patton's decision in all other respects, including his disposition of the alleged violation of the general duty clause, 29 U.S.C. § 654(a)(1), for the reasons given in his decision. In addition, however, I note that the Judge's vacation of the alleged violation of 29 C.F.R. § 1910.106(b)(2)(vii)(b)(3) is warranted for the same reasons that Commissioner Cleary gives for vacating the alleged violation of 29 C.F.R. § 1910.106(b)(2)(vii)(b)(2).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30309

OSHRC EXECUTIVE SECRETARY

JUDGE'S DECISION REC'D AUG 10 1973

FINAL ORDER ON SEP 10 1973

SECRETARY OF LABOR, Complainant,	OSHRC Docket
v.	No. 1829
CONTINENTAL OIL COMPANY, (SOUTHERN FACILITIES TERMINAL), Respondent.	

DECISION

This case is before John S. Patton, the undersigned Administrative Law Judge on the complaint of the Secretary of Labor, United States Department of Labor, hereinafter referred to as complainant, against Continental Oil Company, Southern Facilities Terminal, hereinafter referred to as respondent, alleging that respondent, on or about September 25, 1972, was in violation of the Occupational Safety and Health Act, hereinafter referred to as the Act. It was alleged that respondent violated sections 5(a)(1) and 5(a)(2) of said Act and violated Occupational Safety and Health Standards 29 CFR 1910.106(b)(2)(vii)(c)(5), 29 CFR 1910.106(f)(8), 29 CFR 1910.106(b)(2)(vii)(b)(2), 29 CFR 1910.106(b)(vii)(b)(3) and 29 CFR 1910.106(b)(2)(vii)(c)(7)(i). The case come on for hearing before John S. Patton, the undersigned Judge, in Chattanooga, Tennessee, on April 24, 25 and 26, 1973.

Mr. Frank Steiner appeared as counsel for the complainant and Mr. R. Allan Edgar, appeared as counsel for the respondent. There was no motion to intervene.

LAW AND ISSUES IN THE CASE

It was alleged in the complaint as follows:

The respondent violated standard 29 CFR 1910.106(c)(2)(vii)(c)(5) in that respondent did not provide a drain with a uniform slope of not less than one per cent away from tank toward a sump drain box or other safe means of disposal to prevent flammable or combustible liquids from entering natural water courses, public sewers or public drains.

The respondent violated standard 29 CFR 1910.106(f)(8) in that respondent did not provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank where Class I liquids were stored in amounts greater than 50,000 gallons and unusual exposure hazards existed from surrounding property.

The respondent violated standard 29 CFR 1910.106(b)(2)(vii)(b)(2) in that it did not provide a drainage system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank.

Respondent violated standard 29 CFR 1910.106(b)(2)(vii)(b)(3) in that it permitted drainage from the diked area to discharge flammable and combustible liquids into adjoining

property and public drains which emptied into natural water courses and did not provide a system that would not permit flammable or combustible liquids to be released.

Respondent violated Public Law 91-596, 91st Congress, S. 2193 December 29, 1970, Section 5(a)(1) in that it failed to furnish its employees working in the Southern Facilities Terminal on Jersey Pike in Chattanooga, Tennessee, a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to its employees in that:

1. Employee was required to enter the premises of said terminal to work where vapor laden air was hazardous to the employee.

2. Remote devices were not provided for cutting off gasoline pumps in emergency conditions and,

3. Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

Respondent violated standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i) in that diked area containing approximately six (6) tanks was not subdivided by drainage channels or intermediate curbs in order to prevent spills from endangering adjacent tanks within the diked area and reduce surface for vaporization of flammables.

EVIDENCE IN THE CASE

It was admitted in the answer of respondent that respondent is a corporation having its principal office at Ponca City, Oklahoma, and maintaining a place of business at Chattanooga, Tennessee, for the receiving, storing and delivery of petroleum products. It was admitted at said place of employment in Chattanooga, Tennessee, respondent regularly employs employees who are engaged in handling, transporting, storing and receiving of petroleum products, substantial quantities of which are transported, shipped and delivered across various state boundries. It was stipulated that by reason of said activities, respondent is an employer engaged in a business affecting commerce within the meaning of section 3(a) of the Act and is subject to the jurisdiction of the Occupational Safety and Health Review Commission.

A stipulation was entered into by the parties prior to the hearing which stipulation was covered by a pre-trial order. Said stipulation provided that on September 25, 1972, gasoline from a pipeline flowing into a tank of respondent overflowed the tank, spilling gasoline on to the ground. A fire and explosion ensued as a result of which Mr. Don L. Ross, an employee of the respondent, was severely burned and died. Two employees of Firestone Tire and Rubber Company in said company's building near respondent's premises were killed in an explosion which resulted from ignition of vapors in the Firestone building.

The respondent had six petroleum storage tanks on said premises at the time of said fire and explosion and it was stipulated that the largest of said tanks was what is known in the industry as a nominal 55,000 barrel tank with an actual capacity of approximately 52,000 barrels. The largest tank did not catch fire at the time of said incident. It was stipulated that what is known as Class I liquids were stored in respondent's tanks. At the time the tank was being filled, and said spillage and fire resulted, the respondent did not have an employee at the tank overseeing the filling of said tank.

It was stipulated that respondent provided a drain with the uniform slope of approximately two percent away from the tank and it was admitted by complainant that said slope meets the requirements of the standard. It was stipulated that respondent is not required to comply with both standards 29 CFR 1910.106(b) and 29 CFR 1910.106(c), but that if the respondent has complied with either of the subsections of said standard, the respondent is not in violation of standard 29 CFR 1910.106. In other words, the respondent is required either to have a proper drainage system or to have proper diking but not to have both. It is the position of the respondent that it complied with both standards and the position of the complainant that the respondent complied with neither standard.

There was considerable evidence introduced as to the drainage provided by the respondent. Mr. Laury K. Weaver, Jr., compliance officer with the complainant, testified that he found no drainage channels or curbes subdividing between the tanks to prevent spills from endangering adjacent tanks within the diked area (TR 232), and that he found no evidence of a sump (TR 233, 234). He stated there was no drain box (TR 234). A drawing was introduced as Respondent's Exhibit 19 through Mr. Joseph Laskosky, General Manager of Operations for the respondent. Mr. Laskosky had been with the respondent approximately 14 years. He is a graduate petroleum engineer having graduated from the University of Oklahoma and having spent 21 years in the petroleum industry; three and one-half years in refining both as a laboratory technician and refinery operator; approximately three and one-half years in petro chemicals as an operator in an ethylene plant. He had also worked as a project engineer. He was involved in the design and construction of the Bethany Missouri Terminal. He became a senior staff engineer in the organization in charge of all pipeline and terminal construction. He was assistant district manager of a subsidiary named Cherokee Pipeline Company. He served in headquarters as manager of project research, which involved the study of transfer through pipelines of exotic materials such as coal, phosphate, rock amonia and other unconventional products. He later became general manager of planning, evaluation and research. In his present capacity, he

is in charge of all operations of respondent's pipelines, terminals, design and engineering, construction of the facilities and revamping of its existing facilities. The company operates 10,000 miles of pipeline and approximately 60 terminals. He is on the committee of static measurment of the American Petroleum Institute. Approximately 25 facilities have been designed and constructed under his supervision. He pointed out in his testimony that Respondent's Exhibit 19 shows elevation inside the dike area where a new tank was to be built with contours of existing drain inside terminal and channels to be built around the tank. He introduced Respondent's Exhibit 20 to be identified as a drawing of original construction. He stated that it showed, among other things, drainage channels which he stated were shown to be two feet in diameter, one foot in depth, cut into a V and located around the perimeter of the tank's bottom (TR 538, 539, 540). He stated these were very typical of drain ditches elsewhere. Exhibit 21 was introduced as showing drainage channels to be built around the last tank built (TR 541, 542). Respondent's Exhibit 22 was identified as showing additional earth work to accept the sixth tank (TR 542, 543). Drainage facilities were provided according to the witness for new facilities as well as the old (TR 545). The witness stated, however, that he had not, prior to the fire, personally inspected the construction of this drainage but only knew that it was authorized and that the plans as introduced into

evidence through exhibits called for this work to be done. He stated he had no reason to assume that it had not been done. A photograph was introduced in evidence on which Mr. Laskosky made markings of what he stated were drainage ditches (Respondent's Exhibit 23).

Mr. Weaver testified that respondent had a drain at the southeast corner which drained into a public drainage ditch running along side the spur railroad tracks just south of the respondent's facility (TR 222). He stated that the ditch ran into a waterway approximately 300 yards distance (TR 222). A photograph of the area was introduced into evidence as joint Exhibit 2 (TR 222). The area of the ditch running into the waterway was marked on said exhibit. He testified that there was water in the ditch as well as in the diked area at the time of the accident. He stated this drainage came out of the diked area as reflected in the southeast corner of a photograph introduced into evidence as Exhibit 23. The drainage ditch was described as approximately two feet wide (TR 224) and was 30 to 40 feet long. He did not find any impounding basin and capacity not smaller than that of the largest tank and did not find vacant land for drainage having capacity not smaller than the largest tank (TR 22). Mr. Laskosky testified that there was a pipe drain with closture end 4 x 100 slope through the dike. Such drain was in the corner of the property. The pipe drain

was opened only when an employee was in attendance. It was ordinarily opened to drain rainwater from the terminal dike area and other water that could be accumulated inside the dike area to the tanks themselves. Mr. Laskosky further pointed out that Respondent's Exhibit 22 shows a slope of approximately three to four feet from the south corner of the property to the north corner of the property where the dike drain exists. He stated that the slope was greater than the one per cent requirement. The addition of new tanks did not disturb the drainage. He testified that the plans had been submitted to the construction engineering committee as well as a competent engineer from the electrical field (TR 548). He stated that over a period of time drainage ditches can be eroded (TR 571). The water and foam applied at the time of the fire could have caused considerable erosion of the ditches (TR 532).

A sump was defined by Mr. McKenna, a safety engineer, as a low part of the dike where the water would collect from rain water after a rain or any time. He stated it is necessary to open a valve and let the water out (TR 400). As above stated, Mr. Weaver testified he found no evidence of the sump (TR 233, 234). On the other hand, Mr. McKenna testified that he did observe a sump (TR 399, 400). Mr. Laskosky defined a sump as a low point or depression (TR 537) and stated that a sump was located within the diked area and that Exhibit 17 reflected it in the upper right hand corner of the property

inside of the diked property adjacent to the drain pipe (TR 537).

There was also considerable evidence relating to the dike on the respondent's premises. Mr. McKenna testified that there was proper diking (TR 419). He stated that if the tanks had been separated by diking the dikes would have to be 18 inches. He stated that standard draining channels are preferable to dikes (TR 401). This is true he stated because intermediate curves or dikes can impound the liquid around the tank (TR 401). He stated that if flammable water or foam are floating around in the diked area, compliance or non-compliance with the standard would not have a substantial relationship to the welfare of employees (TR 402). It was stipulated that the diked area at the time of the accident was sufficient to sustain the spill from the largest tank (TR 431). Respondent's Exhibits 17 and 18, introduced by Mr. Laskosky showed the specification for tank beds and tank dikes (TR 534) as well as original specifications for the diked area (TR 533). Respondent's Exhibit 20 also covered the diking.

There was some fire beyond the diked area. A moving picture film taken by the local television station at the time of the fire was introduced into evidence and made a part of the record. This film reflected some fire beyond the dike area. Mr. Jack Shakleford, a reporter for the Chattanooga News Free Press, Mr. Tommy Easton, news photographer for the television

station and Mr. Jerry W. Evans, arson investigator, all testified that there was fire outside the dike (TR 110, 122, 203). Mr. Eason stated that the fire was burning intensely inside the dike but only a small fire outside the dike (TR 110). On the other hand, Mr. Evans testified that the area outside the dike was "burning pretty intensely" (TR 203). Mr. Evans testified that he did not know whether the fire was caused by fluids coming over or under the dike (TR 207). Mr. Weaver stated that there was considerable evidence of scorched ground outside the dike area in areas other than where the drain was (TR 243). Mr. Weaver stated that vapor could have saturated the grass and whatever might have been in the ditch thereby causing the burning. (TR 244). Patrolman Elbe stated that fumes were so thick that it caused his car to flood and die out and he had to stand upon the hood of the car to get some air (TR 145, 146). Mr. Carlyle Bunn, safety engineer with the Department of Labor, testified that the fire outside the dike could not be caused by brush fire but could be caused by petroleum fire; that the heavy black smoke and rolling flame were evidence of petroleum fires (TR 291, 292). On the other hand, Mr. John K. Parsons, safety engineer who is area director for the complainant in New Orleans, stated that petroleum was not the only thing that would have black smoke when it burned (TR 358, 359). He stated that anything with high carbon content would burn (TR 359). Mr. Jack Walker, district manager for Southern Facilities, with 26

years experience in the petroleum industry testified that vapors could have caused the burning outside the dike (TR 464). Mr. McKenna testified that vapor got in the Firestone plant and during the flash ignition, the building exploded (TR 427). Mr. Walker stated that he did not think it was petroleum burning in the ditch because the petroleum would cause more intense fire (TR 463). Mr. McKenna stated that the more vapor given off the more hazardous the condition (TR 417). Mr. Eason testified that although the fire inside the dike continued for considerably longer, the fire outside the dike was extinguished by 10:00 a.m. of the morning of the fire (TR 113). The fact that the fire outside the dike was out by 10:00 a.m., was not contradicted by any witness.

It was shown by joint Exhibit No. 3 and the testimony of Mr. Walker (TR 459, 459), that at the two point A's, respondent had 150 pound wheel dry chemical extinguishers, at point B they had a 30 pound rack mounted on poles, dry chemical fire extinguisher. In the shop, they had a 20 pound mounted extinguisher. At point C, at the end of the truck loading rack, they had a 20 pound mounted extinguisher; point D had a 5 pound CO2 unit carbon dixoide. They also had another CO2 extinguisher inside the laboratory area, there being two of them.

It was testified by Mr. McKenna that a good many of the pipeline terminals don't have water facilities and that they cannot expect to have foam protection without water. He stated that there

is no guarantee that equipment exists that would put out a fire in the largest tank that respondent had. Mr. Harold Purcell, plant manager for Shell Oil Company, having five light oil plants and two heavy oil plants under his supervision, testified that Shell Oil Company did not have equipment that would extinguish fire in a 40,000 to 45,000 barrel tank. He stated that he knew of no terminal that had such equipment and was not familiar with such equipment (TR 158). He stated that Shell Oil Company has an automatic sprinkler on the loading platform as part of the fire equipment, and has dry chemicals on the property to put out a fire (TR 170). Mr. McKenna stated that there is no guarantee that equipment exists that would put out the fire (TR 409), but it depends on variables, the amount of preburns, liquid in tanks, capacity of personnel, quality of extinguishing agent, etc. (TR 409). He stated that you fight fire with chemicals not water (TR 421). He stated it is safer if foam can be put over it (TR 421). Mr. Weaver testified that the fire equipment of respondent was not adequate to put out a fire (TR 217).

The respondent had a valve at the manifold for turning off the flow of petroleum. It was testified by Mr. Weaver and admitted by the respondent that there was no remote valves device to stop the flow of petroleum to the tanks (TR 231). Mr. Weaver testified that the gate would be a good place to put a cut off valve (TR 261). He stated it could be at the north corner of the facility (TR 262). He

stated he checked to see if other companies had remote cut off valves and only found such at Colonial Pipelines (TR 262). However, he did not inspect the other facilities but he inquired receiving negative answers (TR 266). Mr. Teddy L. Barnett, area manager for Colonial Pipeline Company testified that he is not familiar with any duplicate set of valve arrangements within the pipeline industry. He stated that it is fairly standard procedure to have a valve on the tank and a valve at the manifold (TR 72, 73). He stated some places have valves inside the dikes, some further away and some are the same as Southern Facilities (TR 83). He stated all these are hand operated valves. He stated that he has a remote device where he can turn off valves at the pumping station and there is no engineering reason why this could not be used at tank farms (TR 83). Mr. Purcell testified that at Shell Oil Company there is a dike between the storage tank and the valves (TR 169). Mr. W. J. Jackson, superintendent of Exxon Company Chattanooga, Tennessee, testified that Exxon does not have remote valves but only on the tanks themselves (TR 189). Mr. Bunn testified that emergency remote controls are frequently provided for valves or pumps. Other remotely controlled valves are installed for normal operating procedure and can frequently be used during fire emergency procedures to control or stop the flow of liquid (TR 316). He stated valves are available which slow automatically if subjected to fire conditions (TR 316). Mr. Parsons testified that if respondent

had had remote control devices at the gate or other locations, Mr. Ross might have had a chance; that running into an area with so much fumes he could have very easily lost conciousness before the explosion (TR 336, 337). It was stated that when they lose power, the valve automatically goes closed. In the case at bar, this happened although it did not completely close but substantially restricted the flow (TR 88, 89). Loss of power may be cut automatically to less than 250 barrels per hour (TR 90). Mr. Barnett testified that there was no evidence that there was any automatic protection device on respondent's premises.

It was the contention of respondent that the remote control valves at other premises were at refineries rather than bulk distributing plants. Mr. Barnett stated that there are manifold valves at the edge of the dike area (TR 82). Mr. Barnett testified that there is a closed circuit to the respondent's regional office in Atlanta, which was working at the time of the fire and that it is possible to call the Atlanta office and inside of a minute of less, the flow would be shut off without the necessity of going on the premises. It was stated, however, that the power supply burned out during the fire and it, therefore, would not have been possible through the normal power supply to cut it off from Atlanta (TR 85). Mr. Barnett, testified however, that the company had an auxiliary power supply (TR 86). He did not know whether or not it was working in this instance (TR 87). He stated he understood the explosion had

caused the power to go off and that the man from Atlanta couldn't cut it off after 6:40 a.m. (TR 88).

It was conceded that the respondent did not have manned deliveries. There was considerable testimony with reference to the policy of other companies. Mr. Purcell testified that the Shell Oil Company does not have a man present at all times that petroleum is being received. He stated that he knows this to be true in Knoxville, Chattanooga, Nashville, Memphis, Little Rock and Bristol, Virginia (TR 154). When men are present it is not for safety but to direct petroleum into the right tanks (TR 155). Mr. Barnett, area manager of Colonial Pipelines testified that some facilities are manned and some are not (TR 59). He stated that three of nine Colonial facilities in Knoxville have manned receipts. Three of eleven in Nashville have. None of the tanks in Chattanooga are manned (TR 70). Mr. Purcell testified that at the Plantation Oil Company from which he receives his oil, a man is present at all times that petroleum is transmitted to the premises (TR 68). He stated, however, that if there is a long receipt the man will go home (TR 170, 171). When there are deliveries of two or three hours, they keep a man there at all times. When Shell receives oil, Plantation has a man present at all times and he considers it a safety factor. Mr. Jackson of Exxon said that in Knoxville, Nashville, Johnson City, Louisville, Montgomery, Birmingham, which are under his direction, the receipts

of petroleum are manned at all times (TR 178). Between 1968 and 1972, the company did not have a man present for all of long deliveries, however, since 1972, the company has. During the four years that no one was required to be present, the man would come back several times to check the deliveries (TR 179). They were manned around the clock prior to 1968 (TR 180). This was done both to direct the products and for safety. He stated that Plantation has always had a man present (TR 180, 181). Mr. Weaver stated that Exxon has manned deliveries, Aamoco unmanned, Shell unmanned,(TR 267, 268). Mr. Parsons testified that there are a lot of devices but that they have always had a man at the tank farm when they brought any product in (TR 330). He stated they had a pipeline going north with unmanned pump stations (TR 331). Mr. McKenna testified that several years ago it was standard throughout the industry to have a man at the premises during the receipt of gasoline (TR 425). According to him, it was not necessary to have a man present all the time of the delivery and it was manned only part time (TR 425). They would line trucks up and get pumping started, leave and come back within an hour or so (TR 425, 426, 427). He stated that today the policy is to be there when they line up and transmit it into the tank. In night delivery they leave and come back within an hour before the termination of the pumping to handle the switching of the valves (TR 426). He stated that the tanks at Doraville, Georgia, are the only ones he knows of that are computerized (TR 426). He said perhaps others are partly computerized

(TR 427). Mr. Barnett stated that Colonial Pipelines since September 23, 1972, has had a man at all stations when oil is transferred (TR 80). Mr. Parsons testified that he doesn't know of anything that will replace the man for safety (TR 353).

Mr. Robert Johnson, graduate mechanical engineer and director of environmental affairs and safety for respondent, testified that he is familiar with his own terminals, familiar with terminals to which deliveries are made off of their pipeline system and has visited other terminals. He stated his normal procedure is to have a man at the deliver facility prior to receipt of the shipment to insure the terminal valves are lined up or that delivery valves are properly lined up to the gate tank and to be there when the delivery is started to insure that product quality is correct. He then after the stream of petroleum is going into the tank and after he has assured himself that the product is being received as scheduled, could leave and return at such a time or prior to such a time as might be necessary to make a product cut or such operation that requires a change of valves at the terminal (TR 510). He stated that where a terminal has completely manned deliveries, it is generally because the employee is there for other duties (TR 514). Mr. Laskosky, general manager of operations for respondent, testified that respondent has five facilities in the southwest and that they do not fully man receipt of deliveries there. He knows of no other

terminals in the southwest that are fully manned (TR 558, 559). He stated that he has delivered to Exxon in Helena, Missoula and .. Spokane, Washington, and their terminals are not fully manned.

Evidence as to presence or absence of unusual hazards on adjoining property is as follows:

The evidence established that there are several bulk facilities of other companies such as Shell and Exxon in the immediate vicinity of respondent's terminal; that the airport is near and that planes fly a flight pattern over the area of respondent's said terminal and that there is an Army ammunition base which ships TNT on a railroad track near the respondent's facility. These facts are undisputed. The manager of Shell Oil Company's facility stated that he does not feel that the location of the respondent presents any unusual safety hazard. Mr. Parsons testified that there are city codes and state codes which prohibit bulk plants at most sections of the city, that it always has been recognized that service stations, bulk plants, refineries, gasoline plants are hazardous in ordinary occupancy. He stated it is not unusual for the tank farms to be clustered but where they are clustered, there are problems (TR 357, 358). He stated that if they are spread all over the city there would be more of a hazard (TR 358). He stated the plants and things around them are not hazardous themselves until something goes wrong (TR 360). Mr. McKenna confirmed that it is common practice to group

pipeline terminals together (TR 407). He stated he did not see any unusual exposure hazard at respondent's premises (TR 404, 405). He stated the road was not an unusual hazard nor was the driveway, railroad track, airplanes or other facilities (TR 406). Mr. Purcell stated that tank facilities are generally located in the same general area (TR 173), and he felt that other tank farms in the area are not an unusual exposure (TR 174).

LTC Edward J. Bourgeois, Jr., the Commander of the Army Ammunition Depot, near the respondent's premises, testified that TNT is shipped over the railroad tracks near respondent's premises. He stated that TNT is not one of the most dangerous explosives, he testified that for TNT to explode after burning, it takes better than 475 degrees centigrade of heat (TR 132). He stated, however, that the Army's instructions are not to try to put out a fire where TNT is involved but just to get away from it (TR 133). He stated it takes a blasting cap or something like that to set off TNT. He stated the possibility of explosion was greater in a confined space (TR 142). He testified that during the calendar year 1972, on an average of approximately 2.7 rail cars per day were shipped by either Southern or the L & N Railroad from the volunteer Army Ammunition Plant. He stated that in 1972, they shipped 137,000,000 pounds, 106,000,000 of which were by rail. These shipments were made to various places all over the country. The depot is approximately two miles from the respondent's terminal. He stated that in rifle impact

tests, TNT explodes no more than two per cent of the time. When free burning in air, it would not be expected to explode. It would take at least a No. 6 blasting cap to ignite it. He stated that if it had six to seven per cent moisture in it, it would not be expected to explode with a No. 6 blasting cap and it would burn more than likely resulting in a very intense fire. The TNT after leaving the depot is ultimately used as a filler for high explosive artillery rifles. (TR 130, 137). He stated that the reason for not fighting the fire if the TNT is involved is the danger of an explosion. He quoted from Army Material Command Regulations as follows:

> "These materials can be expected to detonate when involved in a fire and except for Classes IV and V are subject to mass detonation. Therefore, no attempt to fight fires involving simply IV materials are made except for manual activation of installed fire extinguishing equipment. Personnel shall leave the building immediately using as much protective cover as possible and activating diluge system and fire alarm equipment while escaping." (TR 139, 140, 141).

He stated that a flash ignition in a box car being a confined space could cause an explosion with the resulting detonation of TNT. He stated that outside in the open burning would be more likely. He stated that signs are erected on the box cars stating that they are explosive and dangerous.

The manager of Shell Oil Company testified that in his opinion TNT box cars are not an unusual hazard (TR 163). Mr. McKenna stated that TNT on a railroad track is not an unusual

hazard, that TNT detonators are in separate cars. He knows of no instance where TNT was detonated in cars (TR 407). He stated that if TNT cars had come by and gas vapors had gotten into the cars it would not have exploded (TR 428). He was of the opinion, however, that the speed of the train would have prevented vapors from getting in. He stated that grass or anything else would have gone up in ignition, it would not have to be TNT (TR 428, 429).

It was undisputed that at the time of the accident the respondent only employed Mr. Ross and a part time assistant at the terminal. Mr. Weaver testified that the day of inspections September 28, 1972, there were a lot of employees around placing pump lines in the liquid (TR 253). He stated, however, that none of respondent's employees were in the ditch at the time of the fire (TR 251).

EVALUATION OF THE EVIDENCE

In subdivision (a) of part IV of the complaint, the complainant states:

> "The respondent violated section 29 CFR 1910.106(b)(2)(vii)(c)(5) in that respondent did not provide a drain with a uniform slope of not less than one per cent away from tank toward a sump, drain box, or other safe means of disposal to prevent flammable or combustible liquids from entering natural water courses, public sewers or public drains."

The Occupational Safety and Health Act relates only to the safety conditions for a respondent's own employees. The Act does

not cover any possible danger which may result from respondent's action to the public at large or to employees of other employers. It will be noted that the above-quoted standard with the requirement that a drain have a uniform slope of less than one per cent away from tank toward a sump, drain box or other safe means of disposal is qualified by the final clause which is "to prevent flammable or combustible liquids from entering natural water courses, public sewers or public drains." Said standard, therefore, is not violated unless the conditions referred to result in flammable or combustible liquids entering natural water courses, public sewers or public drains. The dumping of such materials in natural water courses, public sewers or public drains would tend to remove the flammable or combustible liquids from the area of the respondent's employees' employment and would expose the public at large to said dangers. If the flammable or combustible materials were removed from the area in which the respondent's employees would be working to areas beyond said site it would normally not enhance the danger to employees of the employer.

The program directive No. 100-11 of the Occupational Safety and Health Administration dated October 10, 1972, directed to national and field offices states with reference to this standard:

> Interpretations. The primary and express purpose of this standard is to avoid harm to adjoining property and to water ways. Any resulting

benefit to the safety and health of the employees appears to be secondary. Therefore, paragraph 1910.106(b)(2)(vii) is not intended to apply where its requirements do not have a substantial relationship to safety and health of employees. Each case will have to be considered on its own merits."

There is evidence that a water course runs near the railroad (TR 226). Since TNT is transported over the railroad burning petroleum in the water course could cause danger to employees.

The only evidence, however, of drainage into said water course was the testimony of Mr. Weaver that several days after the fire when the premises were being cleaned up he observed liquid running out of the drain pipes into said water course. He testified however, that the pipes were at the lower part of the dike and that gasoline floats on top of water. It would appear that it was only water that was being drained to said water course.

Any proof of fire in said area would have to be shown to result from drainage. This is not shown by the record.

Therefore, even if it should be held that the proximity of TNT to the water course would make said standard apply, the respondent has not carried his burden of proof as to this allegation.

The complainant alleges in Subdivision (d) of paragraph IV of the complaint that standard 29 CFR 1910.106(b)(2)(vii)(b)(3) is violated in the following respects:

"The respondent permitted drainage from the dike area to discharge flammable or combustible liquids into adjoining property and public drains which emptied into natural water courses and does not provide a system which does not permit flammable or combustible liquids to be so released."

This Judge is of the opinion that the same reasoning applied to the alleged violations of standard 29 CFR 1910.106(b)(2)(vii)(b)(5), is applicable to so much of this standard as relates to public drains. Said standard appears to relate to discharge of dangerous liquids on other property and public drains which would endanger the safety of the employees of other employers and the general public. There would appear, however, to be a distinction in the language of subsection (b)(3) as distinguished from the language of subsection (d)(5) above. In view of the surrounding property, this Judge is of the opinion that if the respondent improperly permitted drainage from the diked area to discharge flammable and combustible liquids into adjoining property, explosion on the adjoining property could endanger the respondent's employees on its own property. It will be noted that an explosion on respondent's property caused an explosion on the property of Firestone, resulting in the death of two of Firestone's employees. It appears that it would be equally possible for an explosion on the property of another Oil company to result in injury or death to persons on the property of the respondent. Said standard does not provide as does the other standard previously referred to that its purpose is to prevent flammable or combustible liquids from entering natural water

courses, etc., but simply states that respondent permitted drainage from the diked area to discharge flammable and combustible liquids into adjoining property, etc. Petroleum entering natural water courses, public sewers or public drains would rapidly be swept away and would be confined to a definite course. On the other hand, drainage on to adjoining property not a public sewer, drain, etc. would constitute a real possibility of spreading a fire to the tank of other oil companies or possibly to the railroad tracks where TNT was being transported which could cause danger to respondent's employees.

It is, therefore, necessary to determine whether the respondent did permit drainage from the diked area to discharge flammable or combustible liquids into adjoining property.

The only proof of the fact that petroleum went outside the diked area is the testimony that there was a fire burning outside the diked area. It was testified that black smoke indicated petroleum was burning but it was further testified that any substance containing corbon could cause black smoke. Mr. McKenna testified that drainage and diking had nothing to do with vapors coming off the top of the tank. The evidence established that there were ways the grass could have caught fire other than through drainage of the petroleum. There were considerable vapors in the air so great that the police officer testified he had to stand on his car in order to get his breath. These vapors spread to the Firestone building, ignited and caused an explosion, bringing about two casualties. It is also evident that

there was a fire on a roof outside of the diked area which could not have been as the result of the petroleum draining to that area, but was probably as a result of vapors. It is entirely possible that the vapors from the tank could have ignited the grass outside the diked area. It is also possible that the explosion could have blown petroleum into an area where the grass beyond the diked area would have caught fire. One can only speculate as to which of these various possibilities was the real reason for the fire beyond the dike. The burden of proof is upon the Secretary, the complainant in this case. The Secretary has not established that the petroleum was running along the ground beyond the diked area and has not established, beyond mere speculation, the cause of the fire beyond the diked area. A respondent cannot be found guilty of violation of a standard by mere speculation. For this reason, this Judge is of the opinion that the allegations of the complaint that the standard has been violated, have not been sustained.

The complaint alleges that standard 29 CFR 1910.106(b)(2)(vii) (b)(2) was violated in that the respondent did not provide a drainage system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank.

The evidence is in dispute as to whether or not there was a basin. Mr. Laskosky testified that there was a drainage basin within the diked area. On the other hand, Mr. Weaver testified that no such basin or sump existed. Irrespective of whether or not there

was a drainage basin, there is no evidence in the record that a drainage basin existed of sufficient size to hold the capacity of the largest tank. The respondent contended that the entire dike area should be included in determining whether or not a basin would hold the capacity of the largest tank. It was stipulated that the diked area was adequate in size to hold this much petroleum. This Judge is of the opinion, however, that the standard does not contemplate the entire dike area in referring to an impounding basin. The purpose of an impounding basin is to drain the petroleum to a confined area in which foam or other fire extinguishing material may be applied. It would not be possible to do this over the entire area within the diking. The petroleum running over an area within the entire diked territory would cause the petroleum on fire to reach the other tanks and cause a greater fire with the possibility of additional explosion. Therefore, the contention of the respondent that the entire diked area should be considered a basin which could hold the contents of the largest tank cannot be sustained. A basin that would not hold the contents of the largest tank does not meet said standard. Therefore, irrespective of whether a basin did or did not exist, the standard has not been complied with and the allegations of the complaint alleging violation of said standard have been established.

Due to the extreme danger and the record of loss of life in such fires, the proposed penalty in the amount of $700.00 appears to be proper.

It is alleged in the complaint that standard 29 CFR 1910.106(f)(8) has been violated in that the respondent did not provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank where Class I liquids were stored in amounts greater than 50,000 gallons and unusual exposure hazards existed from surrounding property. It was stipulated that the respondent did have a tank which stored 52,000 barrels which is, of course, substantially greater than 40,000 gallons. There is considerable difference between the parties as to whether the property surrounding the respondent's installation constituted unusual exposure hazards. It is not unusual for a number of oil companies to have their storage tanks within the same vicinity. The evidence established that this is a common practice. Therefore, the presence of Shell Oil, Exxon and other companies' tanks is not unusual and does not constitute unusual exposure hazards. This Judge is also of the opinion that airplanes flying over do not constitute unusual exposure hazards. A much closer question arises as a result of the Ammunitions Depot and the transporting of TNT along the railroad track. It is true that the Lt. Colonel in charge of the munitions depot testified that TNT is not the most dangerous of explosives; that it takes a very hot fire to cause it to explode. He further stated, however, that because it is in a confined area when it is in a box car, it is possible for it to ignite and to explode. He stated the possibility would be minimized if it was in an open area. He further testified that Army instructions are not to fight

such a fire but to get away from it because of the danger of explosion. This Judge is of the opinion that the presence of TNT in the vicinity does constitute an unusual hazard.

This Judge is of the opinion, however, that said standard has not been violated for the following reasons:

It is established by the preponderance of the evidence that although the respondent has substantial fire extinguishing equipment, this equipment is not adequate to extinguish an oil fire of the magnitude described in the standard. The evidence, however, is to the effect that fire extinguishing equipment sufficient to put out a fire in the largest tank of respondent simply does not exist. The fact that compliance with the standard is expensive or difficult would not excuse the respondent from complying. This Judge is of the opinion, however, that a standard cannot compel a respondent to perform an impossibility. If the equipment sufficient to put out a petroleum fire in a large tank has not as yet been invented, the respondent cannot be found guilty of violation of the standard for failing to do the impossible. The evidence shows that the respondent does have very substantial firefighting equipment. Because the evidence establishes that compliance with the standard is impossible and the Judge is of the opinion that the respondent has made a diligent effort to secure such fire fighting equipment as is reasonably possible, violation of this standard has not been established.

It is further alleged in the complaint that the respondent has violated the so-called general duty section of the statute. Said section 5(a)(1) of the Act provides that the respondent is in violation if it fails to furnish its employees a place of employment which is free from recognized hazards; that will cause or are likely to cause death or serious physical harm to its employees.

It will be noted that for a respondent to be found in violation of said section of the Act, it is necessary that it constitute a recognized hazard. "Recognized hazard" has been held to be a hazard that is recognized in the industry rather than necessarily a hazard which the respondent himself recognizes. There is no question that it is recognized that fuel escaping from a storage tank is a very real and definite hazard. Statistics introduced in evidence established that there are approximately three and one-half fatalities for every fire of this nature which has occurred. It is not adequate, however, to find that such a fire is hazardous, but it must be established that some action that the respondent did or did not take is recognized as hazardous within the industry.

It is alleged that an employee of respondent was required to enter the premises of the terminal to work where vapor laden air was hazardous to the employee. As above noted, the facts established that Mr. Ross, the employee who lost his life at the time of this fire, went upon the premises for the purpose of cutting off the valve to stop the continued flow of petroleum. Whether he was justified in

taking this action and whether it was necessary and whether the respondent should be held responsible for this action is very strongly controverted in this case. It is insisted by the respondent that Mr. Ross had been instructed that he should, under these circumstances, call the regional office in Atlanta and that such a call would have resulted in a cut off of the flow of petroleum within a time of less than one minute. On the other hand, it is not disputed that the explosion disrupted the contact with Atlanta and it would not have been possible after the explosion to call Atlanta on the regular service. There was testimony in the record that there was an auxiliary service which might have enabled a contact to be made. There is no doubt that it was essential for the flow of gasoline to be stopped. This position of the complainant is very closely tied to the further contention of the complainant that the respondent was in violation of the general duty standard by not providing remote devices for cutting off gasoline pumps in emergency conditions. The question remains, however, as to whether it was a recognized requirement in the industry. The record establishes that remote control valves were not generally used in the industry. Mr. Barnett said he was not familiar with any duplicate set of valves arrangement anywhere in the pipeline industry. Mr. Johnson stated that remote valves were not rare but they were not common either (TR 518). Mr. Jackson, superintendent of Exxon, testified that Exxon only has valves on the

tanks themselves. On the other hand, the National Fire Protection Handbook stated that emergency remote controls are frequently provided for valves or pumps particularly at dispensing locations. Mr. Laskosky said that he believed remote valves were desirable and would increase the hazard because of added strain a cut off would make on the pipeline.

There was testimony from the respondent that the use of remote valves was almost entirely at refineries as distinguished from bulk tank distribution points. The type of storage is the same but it was the position of the respondent that there are differences in the types of operation which justify distinctions.

This Judge is of the opinion that remote valves could be used and probably are desirable for emergency situations. If there was a standard requiring their use, this Judge would have no hesitancy in finding a violation of said standard. The general duty provisions of the Act, however, require it to be established, not only that an additional precaution is desirable, but require it to be shown that such precaution is accepted as a necessity in the industry. There apparently is some difference of opinion in the industry as to the desirability of remote control valves and it would appear that most petroleum companies do not have them. Under these circumstances, it cannot be said that the absence of such a valve creates a recognized hazard. If remote control valves are needed as an

added precaution to safety, this need addresses itself to the Secretary and to the power to promulgate the standards. It would not be proper for the Review Commission to, under the guise of the general duty provisions of the Act, in effect promulgate a standard.

It is the further position of the respondent that automatic devices or persons should have been employed to detect accidental discharge of flammables so that hazardous conditions which could endanger employees and others could be prevented. This Judge is of the opinion that this contention is analogous in its effect to the contention just discussed above. Apparently, there are alarms and other devices which would be helpful and would add to safety, none of which the respondent used. The complainant introduced into evidence and also read in the record, excerpts from the National Fire Protection Handbook as follows:

> Continuous analysers. Continuous analysers are permanently installed, line powered devices for continously analyzing air samples from one to as many as 20 points. They may be either of the remote detection (deffusion) type or may grow samples through tubing to a central location by means of a suction pump or equivalent. The functions may include auditory or visable alarms in addition to continuous recording of data, two level alarms, e.g., a warning light at 40 per cent l.f.l. and an audible alarm at 50 per cent of l.f.l. automatic shut down or start up of equipment and similar features as required by the individual application.

> The central equipment is available either for installation or non-hazardous locations such as control rooms or in listed explosion-proof inclosures for hazardous areas. Continuous analysers are frequently tailor made to meet the exact requirement of a particular installation and they also employ operating procedures other than catalystic combustion.

Mr. Laskosky testified that such equipment is not common in the industry. It was testified that equipment could be used for setting off alarms, cutting off valves or giving off signals. It was testified by Mr. Parsons that such equipment is common in refineries, that refineries will have both audible and visible alarms actuated simultaneously. He testified that after the company he formerly worked for put in automatic alarm systems, no persons were killed that he knows of, although they had a terrible fire and explosion prior to the use of this system. Mr. Jackson testified that Exxon company has fire alarms in Birmingham and that they are being installed in Knoxville. Mr. McKenna stated some companies use alarms but it is not an industry practice. He conceded, however, that Exxon is a large part of the industry and that if Exxon used them there was a substantial part of the industry using this equipment. He testified that there are devices that set off alarms that can turn off valves and can signal the pipeline all the way across the country to turn off valves. Mr. McKenna stated that common carrier pipelines do not have "this exotic" equipment. He stated that a company

would either buy an alarm system or would modify the existing to shut the flow off in an emergency. Mr. Lankosky stated that [illegible] standards relating to alarms and shut down devices are not applicable to bulk terminals. Mr. Lankosky testified that a refinery plant must have specific temperatures, flows and pressures at very precise levels in order to get the type of product desired and, therefore, there are alarms and other equipment regulating temperatures, flows pressure levels and so forth. He stated that to shut off a refinery would be disasterous; that the entire situations are different.

It appears to this Judge that a good case can be made for the contention that alarms and the other equipment described are desirable. There are three and one-half deaths for each fire of this nature. Every possible precaution would, therefore, be indicated. It remains true, however, that the Secretary has not seen fit to make such a requirement by promulgating a standard. It is not for this Judge to suggest to the Secretary what he should so and when to promulgate a standard. There is apparently some use of such devices in the industry, particularly by Exxon which is one of the largest companies in the industry, however, the evidence is not clear as to whether a majority of the companies in the industry use any of these devices. It cannot be said that the industry recognizes these devices as a necessity for safe operations, and therefore, the allegations of violation of this section of the Act because of lack of alarms and other equipment cannot be sustained.

Although some companies have completely manned deliveries the evidence establishes that most companies do not. It may well be argued that manned deliveries in view of the hazards involved would be a helpful precaution. The fact remains that no standard has been cited requiring it and the evidence does not establish that the industry considers it a hazard not to man the deliveries. Therefore, for the same reasons set forth above in discussion of alarms and other safety devices, the respondent cannot be found to be in violation of the general duty clause because of failure to have manned deliveries.

It is alleged that the respondent violated the Act and standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i) in that the diked area contained approximately six tanks which were not subdivided by drainage channels or intervening curbs in order to prevent the spills fron endangering adjacent tanks within the diked area and to reduce surface for vaporization of flammables. Mr. Weaver testified that at the time he inspected the premises, several days after the fire, said drainage ditches were not to be found. On the other hand, Mr. Laskosky testified that the plans for the facilities required that drainage ditches be dug. Exhibits 17, 18 and 19, which are blue prints of the facilities prepared at the time of various stages of construction were introduced into evidence through Mr. Laskosky and include drainage ditches. Mr. Laskosky, however, stated that he had not inspected the property subsequent to construction, and therefore,

he did not personally see whether or not the plans were implemented. Respondent's Exhibit 23 is an aerial photograph on which Mr. Laskosky pointed out and marked the area which he stated the photograph showed to be the ditches in question. An examination of this photograph under a magnifying glass does appear to reflect what would seem to be drainage ditches. It was testified by Mr. Laskosky that the ditches could have been very substantially eroded as a result of the fire fighting, the tremendous amount of water, foam, etc. used to extinguish the fire. Respondent's Exhibit 23 as viewed under a magnifying glass substantiates this testimony. The evidence established that a large number of truck drivers were constantly on the premises picking up petroleum for their respective companies. None of these drivers were called to the stand by either party. The evidence on this question is not entirely clear. The complainant presented prima facie evidence that several days after the fire ditches were not observed. It is entirely possible that there could have been considerable washing and change in the ground as a result of several days of fire fighting. On the other hand, although the respondent clearly proved that the plans, which were otherwise implemented, called for such ditches, the only evidence that the ditches were actually dug is respondent's Exhibit 23. The issue is not free from doubt but this Judge is of the opinion that the testimony of Mr. Laskosky that the places on the photograph which

he marked were the ditches in question, is substantiated by the photograph itself as it does appear to contain such ditches. This photograph was taken subsequent to the fire. This evidence coupled with the three exhibits of plans introduced, including the testimony of Mr. Laskosky that the plans represent the work that was to be done and that he had no reason to assume that it was not done lead this Judge to the opinion that the complainant has not by the greater weight of the substantial evidence established that the standard has been violated. At best, the complainant's evidence is to the effect that subsequent to the fire with the possible erosion and washing, the ditches were not present. In the opinion of this Judge even this fact is contradicted by Respondent's Exhibit 23.

FINDINGS OF FACT

1. Respondent is a corporation having its principal office at Ponca City, Oklahoma, and maintaining a place of business at Chattanooga, Tennessee, for the receiving, storing and delivery of petroleum products.

2. Respondent, at all times relevant to this case, regularly employed employees who are engaged in handling, transporting, storing and receiving petroleum products, substantial quantities of which are transported, shipped and delivered across various state boundaries. Respondent is engaged in a business affecting commerce within the meaning of section 3(a) of the Act.

3. On or about September 25, 1972, there was a spillage of petroleum from one of the respondent's tanks at Chattanooga, Tennessee, and a fire and explosion ensued.

4. As a result of said fire and explosion, Mr. Don L. Ross, an employee of the respondent was severely burned and subsequently died from his burns.

5. Two employees of Firestone Tire and Rubber Company, working in a building of Firestone Tire and Rubber Company near respondent's premises were killed in an explosion which resulted when fumes from the fire at respondent's terminal ignited.

6. Respondent had six petroleum storage tanks on its premises at Chattanooga, Tennessee, at the time of said fire and explosion, the largest of which tanks was a nominal 55,000 barrel tank with an actual capacity of approximately 52,000 barrels. The largest tank did not catch fire at the time of said incident.

7. Class I liquids as referred to in the Occupational Safety and Health Standard were stored in respondent's tanks.

8. At the time the tanks were being filled on September 25, 1972, and the fire and explosion occurred, the respondent did not have an employee at the tank overseeing the filling of said tank.

9. Some petroleum companies in the industry have employees present throughout the time that petroleum is being received in the tanks from the pipelines, but the evidence fails to establish that the majority of the industry does so.

10. The respondent did not have a system of alarms or other automatic detection devices to detect accidental discharge of flammables.

11. Some petroleum companies in the industry have such alarms and other automatic detection devices, but the evidence fails to establish that a majority of the industry does so.

12. Respondent provided a drain with the uniform slope of approximately two per cent away from the tank.

13. The respondent did not have a drainage basin system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank.

14. The respondent did have drainage ditches as required by the standard, including drainage ditches around its tanks.

15. The respondent had diking as required by the standard.

16. The evidence does not establish that fire which occurred beyond the diked area resulted from drainage beyond the dike.

17. The evidence does not establish that petroleum drained beyond the dike.

18. Drainage into the public drainage ditch which ran along the railroad, consisted of water and the evidence does not establish that it included petroleum.

19. Shell Oil Company, Exxon Oil Company and other companies had bulk storage tanks on their premises which immediately adjoin the

premises of the respondent in Chattanooga, Tennessee, and the path of flight to the commercial airport of the City of Chattanooga was immediately above the premises of the respondent.

20. The United States Army has an Ammunition Depot approximately two miles from the premises of the respondent and TNT was shipped from said depot over a railroad track immediately adjoining the premises of the respondent. A public water way, into which water drained from the respondent's premises, ran along side said track. The shipment over said railroad tracks of TNT constituted an unusual hazard.

21. The respondent had substantial equipment to extinguish fires, but there is no equipment invented which will extinguish a fire in a large petroleum storage tank and, therefore, respondent's equipment was not adequate to extinguish a fire in the largest tank.

22. The respondent had a cut off valve to cut off the flow of petroleum into the tanks on its premises, but did not have a remote valve beyond the danger area. The evidence does not establish that remote cut off valves are used by a majority of the industry.

23. The flow of petroleum could have been cut off in less than a minute's time by calling the respondent's Atlanta, Georgia facility and having it cut off by actions from Atlanta.

24. After the explosion occurred, the normal means whereby the flow of petroleum could have been cut off by communicating with Atlanta were severed.

25. The evidence establishes that there were auxiliary power sources in case of a failure of communication and power from Atlanta, but the evidence does not clearly establish whether same were functioning.

26. The evidence does not establish that respondent required an employee to needlessly enter its premises where vapor laden air was hazardous to the employee under circumstances which would constitute a recognized hazard.

27. The respondent has not failed to furnish its employees a place of employment which is free from recognized hazards that would cause or were likely to cause physical harm to its employees.

CONCLUSIONS OF LAW

1. The respondent, at all times relevant to this cause, was engaged in a business affecting interstate commerce and, therefore, is covered by the Act and the Occupational Safety and Health Review Commission has jurisdiction of this proceeding.

2. Respondent did not on September 25, 1972, violate Occupational Safety and Health Standard 29 CFR 1910.106(c)(2)(vii)(c)(5).

3. Respondent did not on September 25, 1972, violate standard 29 CFR 1910.106(f)(8).

4. Respondent did not on September 25, 1972, violate standard 29 CFR 1910.106(b)(2)(vii)(b)(3).

5. Respondent did not on September 25, 1972, violate section 5(a)(1) of the Act.

6. Respondent did not on September 25, 1972, violate standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i).

7. On September 25, 1972, respondent violated standard 29 CFR 1910.106(b)(2)(vii)(b)(2) in that it did not provide a drainage system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank. This was a serious violation and the respondent should be assessed a penalty in the amount of $700.00 for said violation.

ORDER

It is therefore Ordered that:

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(c)(2)(vii)(c)(5) are dismissed.

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(f)(8) are dismissed.

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(b)(2)(vii)(b)(3) are dismissed.

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i) are dismissed.

The allegations of the complaint alleging violation of section 5(a)(1) of the Act are dismissed.

The respondent be and hereby is found to be in violation of standard 29 CFR 1910.106(b)(2)(vii)(b)(2) and section 5(a)(2) of the Act. A penalty in the amount of $700.00 is hereby assessed for

violation of standard 29 CFR 1910.106(b)(2)(vii)(b)(2). The abatement date as set forth in the citation and complaint be and hereby is affirmed for violation of said section.

Dated this _____ day of 8 AUG 1973, 1973.

JOHN S. PATTON, Judge

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OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION
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AUG 10 1973
Office of the Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of November, 1980, I served the above Separate Appendix to Petition for Certiorari on behalf of the Petitioner by depositing three (3) copies thereof in a United States post office or mailbox with first-class postage prepaid to all counsel of record and also to the Solicitor General at the following addresses, all in accordance with Rule 28 of the Rules of the Supreme Court of the United States:

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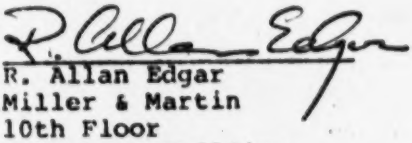

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